In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 878

SERTA ASSOCIATES, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph (1)(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court (J.S. App. B) in a civil antitrust action brought by the United States.[1] The court held (J.S. 1a–14a) that appellant violated Section 1 of the Sherman Act, 15 U.S.C. 1, by engaging in a scheme to fix retail prices and to allocate exclusive geographical territories among its licensees, and enjoined appellant from continuing these practices (J.S.

[1] This was one of four cases brought in May 1960 which challenged price-fixing and territorial allocation arrangements

14a–18a). Appellant has appealed only from that portion of the judgment banning further allocation of exclusive territories (J.S. 19, n. 8).

Serta Associates, Inc., was organized in 1931 by a group of regional bedding manufacturers seeking a cooperative method of nationally merchandising trademarked bedding products (J.S. 1a). The Serta trademark is today one of the leading national bedding brands, with total sales surpassed only by Simmons and Sealy (see J.S. 8).

Serta's stock is owned entirely by its 40 member-licensees,[2] each owning from 15 to 50 shares (GX 1, p. 6). A share of stock entitle the holder to one vote (GX 7, p. 2). Management of the corporation is vested in a seven-member board of directors composed of proxies or representatives of the licensee-shareholders (J.S. 1a–2a; GX 7, p. 4).

For approximately the first two years of Serta's operations, the licensees were free to sell wherever

---

in the bedding products industry. The arrangements in each case were virtually identical. In two of the cases, consent decrees were entered in which the companies agreed to eliminate territorial restrictions. *United States* v. *Restonic Corp.*, 1960 Trade Cases ¶ 69,739 (N.D. Ill.); *United States* v. *Spring-Air Co.*, 1962 Trade Cases ¶ 70,402 (N.D. Ill.). In the third case, *United States* v. *Sealy, Inc.*, 1964 Trade Cases ¶ 71,258 (N.D. Ill.), the district court held that Sealy had fixed prices, but that the company's allocation of exclusive territories was not an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. This Court reversed, holding that the allocation of exclusive territories, when combined with unlawful price-fixing activities, was illegal *per se* under Section 1. *United States* v. *Sealy, Inc.*, 388 U.S. 350.

[2] Of this number, 36 operate in the United States and four in Canada (J.S. 3).

and to whomever they chose. On November 26, 1932, Serta's executive committee, composed of Serta licensees or their representatives, initiated a policy of assigning exclusive territories to licensed manufacturers of Serta trademarked products.[3] (J.S. 7). Territorial

[3] At the opening of the trial, the district court, over the objection of appellant, entered an order separating the trial into two stages, one concerned with the allegations of price fixing and the other with the alleged territorial allocations. The order contained a statement of facts to which, according to the order, the parties had stipulated, namely:

> 1. In 1931, Serta Associates, Inc. under the name of Guardian Knight Corporation, was incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois.
>
> 2. Since its incorporation, Serta Associates, Inc. has been wholly owned by its licensees, independent mattress manufacturers.
>
> 3. Since at least 1933, Serta Associates, Inc. has had a continuous agreement with each of its licensees not to license any person to manufacture or sell Serta products in a licensee's designated area; and each licensee has agreed not to manufacture or sell Serta products outside its designated area.
>
> 4. Since 1940, Serta Associates, Inc. and its licensees have adhered to and enforced the mutually exclusive-territorial agreements.

This stipulation was agreed to by appellant through its attorney in open court (Transcript, January 8, 1968, pp. 8–12), and it is clear from this colloquy that appellant's objection was directed not to the accuracy of these statements, but to the procedure adopted by the trial judge in separating the trial into two portions (see *id.* at 11–12).

A copy of the district court's order is reprinted in full in the appendix to this motion.

Appellant claims that it was foreclosed from offering proof on the territorial issue by the district court. At the close of the case on the price-fixing issue the court suggested that appellant withhold any proffer on market allocation until after its decision on price-fixing (Tr. 2689–2690). Appellant did not renew its

allocations are expressly stated in the license agreements, but the Serta by-laws permit the licensees to collaborate between themselves in making adjustments or altering the geographical boundaries of each licensee's area (GX 7, p. 22; see also GX 1, p. 10). Indeed, adjacent licensees are encouraged to settle territorial disputes themselves, with the Serta central office playing as minimal a role as possible.[4] Serta licensees are not precluded from marketing private label products; Serta makes no attempt to regulate the activities of its licensees in selling non-Serta brands and no division of territories exists with respect thereto (GX 1, p. 10).

In addition to the maintenance of territorial allocations, Serta has followed a consistent policy of inducing retailers to sell and advertise Serta mattresses and box springs at agreed-upon retail prices. (GX 8, p. 6; GX 9, p. 3; GX 10–19, pp. 2, 7; GX 20, pp. 2, 8; GX 21–24; pp. 2, 9; GX 107, p. 2.) These prices are determined semi-annually by the Serta board of directors and ratified by the shareholders. The price lists are then disseminated by the Serta staff among licensees, and in turn licensees request their dealers to follow those prices (GX 387, 405, 1034; Tr. 2041–2042). Licensees are prohibited from supplying Serta

---

proffer until approximately two weeks after it filed its notice of appeal. This proffer was denied as untimely.

[4] The record contains a number of examples in which parties adjusted their territories, either on their own initiative, or as a result of inducement by the Serta office. (See, *e.g.*, J.S. 5a, n. 3; GX 1064–1070; GX 117, p. 4; cf. GX 117, p. 3).

products to any dealer who fails to limit comparative price selling and advertising to one-third off the list price (GX 16–19, p. 7; GX 20, p. 8; GX 21–24, p. 9). Furthermore, in order to stabilize prices, Serta has banned the use by Serta dealers of promotional devices which might disrupt the retail price structure (J.S. 8a; GX 16–24, p. 2.)[5]

In order to restrain dealers from advertising at cut prices, Serta and its licensees have established cooperative programs; Serta supplies advertising mats and sales material and subsidize part of the cost, but only to dealers willing to advertise at the suggested retail price (J.S. App. 7a–8a).

The policing of Serta's price maintenance policy, like that of policing its exclusive territories, is based almost entirely on licensee and dealer cooperation in reporting violations (Tr. 2033; GX 313, 352, 394, 405, 1035). Licensees have complained that a break in the price in one territory "was causing difficulties in other territories" (GX 352). Indeed, the Chicago

[5] The specificity of Serta's resale price restrictions is shown by its current Rule 5 (formerly Rule 6):

> 5. No suggested retail price may be shown on any kind of label or tag including a price tab attached to any product carrying any kind of Serta identification including law labels showing Serta as a part of a member's factory name, or in any kind of advertising, merchandising, sales promotion or sales material used in connection with such product—*except* where used on a Serta standard item on which specifications and suggested retail price have been issued by the Serta Central Office—or *except* where used on a Serta labeled item made to a dealer's individual specifications, under his name, and with the definite understanding that such item will always be sold at the retail price shown on the label. [J.S. App. 8a, n. 9; GX 16–24, p. 2.]

licensee recognized that undetected price-cutting by his dealers might create difficulties for adjacent territories and therefore requested the Omaha licensee to inform him of any breaks in suggested retail prices by Chicago Serta dealers (J.S. 5a, n. 3; GX 1043).[6] As an added check on dealer advertising, Serta subscribes to newspaper clipping services which afford it an opportunity for prompt discovery of price cutting by uncooperative dealers (GX 308, 310; Tr. 2464–2467).

ARGUMENT

In all material respects this case is identical with, and therefore controlled by, *United States* v. *Sealy, Inc.*, 388 U.S. 350, in which this Court recently held that a system of territorial allocations effectuated horizontally through a trademark licensing arrangement established by the licensee manufacturers of bedding products violated Section 1 of the Sherman Act (J.S. 2a). Appellant points to no material fact which would distinguish that precedent,[7] nor

[6] As he explained: "* * * if at any time you hear of our dealers breaking the price of the Perfect Sleeper—or any other suggested retail prices, please feel free to let us hear from you immediately, as we are most anxious to protect all Serta dealers."

[7] Appellant's assertion (J.S. 9–10) that "the complaint contains no allegation of horizontal price-fixing on the part of licensees, and the Government concedes that this is not an issue in the pending litigation" is misleading. The government did not charge a horizontal agreement to fix the price at which licensees sell to dealers; it did, however, charge, and the court below found, a horizontal conspiracy to fix retail prices (J.S. 9a). This is the same type of horizontal price-fixing found in *Sealy*. See 388 U.S. at 355.

Similarly, the fact that territorial restrictions were not imposed on the sale of non-Serta brands does not distinguish this arrangements from *Sealy*. Sealy's restrictions similarly applied

any new argument to justify reconsideration of it. Indeed, appellant presented the position it urges here, in an *amicus* brief in *Sealy*, and the Court obviously found it unpersuasive. Compare J.S. 11–22, with Brief *Amicus Curiae* of *Serta Associates, Inc.*, No. 9, Oct. Term, 1966, pp. 23–28. In these circumstances, plenary review of this case is not warranted.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT A. HAMMOND III,
Acting Assistant Attorney General.

GREGORY B. HOVENDON,
WILLIAM R. WEISSMAN,
Attorneys.

JANUARY 1969.

---

to Sealy products only, but this Court stated that this fact was "not consequential" to its holding that the arrangement was illegal. (*Id.* at 356, n. 3.)

APPENDIX

United States District Court
Northern District of Illinois
Eastern Division

Civil Action No. 60 C 843

[Entered January 9, 1968]

UNITED STATES OF AMERICA, PLAINTIFF

v.

SERTA ASSOCIATES, INC., DEFENDANT

At Chicago, Illinois in said Division and District on January 9, 1968.

ORDER

This cause coming on to be heard upon the Government's suggestion that consistent with the Supreme Court opinion in *United States* v. *Sealy, Inc.* and as a basis for separating the trial of this cause into separate stages or phases and thus limiting the issues and shortening the trial that the parties stipulate as to the existence of an agreement by and between the defendant and its licensees to allocate exclusive territory to manufacture and sell Serta brand mattresses, and the Government submitting that there is no genuine fact issue as to the existence of the above arrangement, the Government suggests that in order to save time that this trial in its initial stage be restricted to a determination of the issue of price maintenance and if the Court finds for the Govern-

ment this case will be concluded by the entry of appropriate findings of fact and a decree. If, on the other hand, the Court determines that the Government has failed in its proof on price maintenance, then consideration should be given to the illegality standing alone of the horizontal division of territory.

The Court having heard from counsel, being advised that the following facts are undisputed, and being otherwise fully advised in the premises, it is ordered that for the purpose of procedurally separating this case into stages or phases the following undisputed facts are found:

1. In 1931, Serta Associates, Inc. under the name of Guardian Knight Corporation, was incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois.

2. Since its incorporation, Serta Associates, Inc. has been wholly owned by its licensees, independent mattress manufacturers.

3. Since at least 1933, Serta Associates, Inc. has had a continuous agreement with each of its licensees not to license any person to manufacture or sell Serta products in a licensee's designated area; and each licensee has agreed not to manufacture or sell Serta products outside its designated area.

4. Since 1940, Serta Associates, Inc. and its licensees have adhered to and enforced the mutually exclusive-territorial agreements.

A recital of these undisputed facts is made for the purpose of limiting the issues and shortening the trial, but is not to be construed to preclude either party from offering evidence as to the reasons for the exclusive-territorial agreements, the methods used in enforcing them or obtaining adherence to them, or the results that have flowed from them. The opposing side reserves the right to object to the admissibility

of such evidence on the basis of competency, relevancy and weight.

The first phase of the trial will be limited to the price maintenance issue and after it is decided, a supplementary order will be entered, if necessary, controlling any further procedure in this case.

Enter:

/s/ BERNARD M. DECKER,
United States District Judge.

We agree that the foregoing Order is satisfactory as to form this 9th day of January 1968.

/s/ BERTRAM M. LONG,
Attorney for Government.

_____,
Attorney for Defendant.

U.S. GOVERNMENT PRINTING OFFICE: 1969